

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 13, 2007

STATE OF TENNESSEE v. WARREN CURNUTT

Appeal from the Circuit Court for Giles County
No. 11201 Stella Hargrove, Judge

No. M2006-00552-CCA-R3-CD - Filed May 22, 2007

Appellant, Warren Curnutt, was indicted with two counts of rape of a child. After a jury trial, Appellant was convicted on both counts. As a result, Appellant was sentenced to fifteen years for each conviction, to be served consecutively, for a total effective sentence of thirty years. On appeal Appellant presents the following issues: (1) whether the trial court erred by failing to require the State to elect offenses; (2) whether the trial court improperly admitted Appellant's statement into evidence; (3) whether the trial court erred by allowing the trial to continue after the jury pool was allegedly unfairly prejudiced; (4) whether the trial court improperly instructed the jury on lesser included offenses; and (5) whether the evidence was sufficient to sustain the convictions. Because we determine: (1) that the prosecutor effectively elected offenses during closing argument; (2) that Appellant waived any issue regarding his statement because he failed at trial to object to the introduction of the statement on the grounds it was involuntary; (3) that Appellant waived the issue regarding the jury prejudice for failure to request a curative instruction; (4) that Appellant waived the issue regarding lesser included offenses for failure to request instructions in writing; and (5) the evidence is sufficient to support the convictions, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES, and J. C. McLIN, JJ., joined.

Stanley K. Pierchoski, Lawrenceburg, Tennessee, for the appellant, Warren Curnutt.

Robert E. Cooper, Jr., Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; Mike Bottoms, District Attorney General; and Christy Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In October of 2003, Appellant was indicted with two counts of rape of a child. At trial, C.E.¹ testified that Appellant and her mother dated in the past. When C.E. was around four years old, Appellant lived with them. After her mother and Appellant stopped dating, C.E. continued to see Appellant on weekends in order to visit both Appellant and her half-sister Lindsay, who lived with Appellant. C.E. referred to Appellant as her “Daddy” even though he was not her biological father.

C.E. testified that on a night near the middle of her fourth grade school year, she went to Appellant’s home to work on a science project. C.E. fell asleep on the couch, while Appellant stayed up in the kitchen, working on the project. Appellant got up and took a shower, after which C.E. asked him for a glass of tea. Appellant brought C.E. a glass of tea and sang “Hush Little Baby” to her.

Sometime later, after C.E. fell asleep, Appellant woke her up. C.E. stated that Appellant was naked. Appellant removed C.E.’s clothing and put his penis into her vagina. Appellant then placed his penis in C.E.’s mouth. C.E. stated that the ordeal lasted “about two hours,” during which Appellant told her that he loved her and she made “daddy feel good and really, really special.” Eventually, Appellant’s wife noticed that he was not in bed and called out for him. Appellant got up, put on his clothing, and went back to the bedroom with his wife.

According to C.E., at the conclusion of her fourth grade school year, she participated in “field day” at school. After school that day, C.E. went to Appellant’s house to spend the night. C.E. testified that the next morning she was in the living room when Appellant came out of the bathroom wearing a towel. Appellant told the victim he had a “surprise” for her and told her to go to his bedroom. C.E. refused, so Appellant picked her up over his shoulder and carried her to the bedroom, where he slammed and locked the door. Appellant then took off his towel and removed C.E.’s clothing. At that point, C.E. testified that Appellant put his “worm” in her mouth. Appellant then inserted his “worm” into her “coochy.”² C.E. stated that Appellant “kept pushing it in and out, in and out, until it really hurt. And this went on for 10 minutes.” During this time, Appellant told C.E., “[Y]ou make daddy feel special. Don’t tell anybody what daddy’s doing to you and what I have done to you You will get me in very big trouble.” C.E. stated that Appellant’s penis was “actually in her body” as opposed to touching her vagina. C.E. stated that someone knocked on the front door of the house, and Appellant got up, went into the bathroom and got a washcloth. Appellant used the washcloth to wipe some “green looking stuff” from his “worm” and her “coochy” before he got

¹It is the policy of this Court to refer to minor victims of sexual abuse by their initials only.

²The victim used the terms “worm” and “coochy” to describe the penis and vagina, respectively.

dressed and answered the door. C.E. did not know where the “green looking stuff” came from, but it was on both Appellant’s penis and her vagina. C.E. put her clothes back on at that time. Appellant’s brother was at the front door and wanted to show off his new haircut.

Eventually, C.E. told her mother’s best friend, Joyce Baker, about the incidents. C.E. was crying and asked Ms. Baker not to tell anyone about what happened. Ms. Baker asked C.E. to tell her mother what was going on and accompanied C.E. the next morning while she told her mother.

Investigator Michael Chapman of the Giles County Sheriff’s Department testified that he received a report of child sex abuse involving C.E. on July 18, 2003. On July 21, 2003, Investigator Chapman and Polly Voight of the Department of Children’s Services (DCS) interviewed Appellant, who came to the office voluntarily. At the time of the interview, Appellant was not under arrest. Appellant had learned of the allegations against him from family members and sought out Investigator Chapman. As the interview began, Investigator Chapman made it clear to Appellant that he did not have to be there, did not have to talk to them and could “get up and leave now or at any time during this proceeding.” Investigator Chapman even gave Appellant directions on how to leave the building if he chose to end the interview.

Appellant informed Investigator Chapman that he was aware of the accusations against him, but that there was not a whole lot he could say about them. Appellant claimed that the only time he ever touched the victim with his hand was while he was giving her a bath, and the last time that had occurred was a couple of years ago. When Investigator Chapman informed Appellant that the victim had been very detailed in her description of the sexual activities that occurred, Appellant responded that a friend could be telling the victim what to say. Appellant insisted that the accusations were a lie. Appellant admitted that he slept in the same bed with C.E. “99 percent of the time.” Appellant also stated that it was “possible” that he could have rolled over on the victim where she thought he was trying to penetrate her. The following exchange occurred during the interview between Investigator Chapman and Appellant:

INVESTIGATOR CHAPMAN: Was there ever a time that you woke up that you found yourself close to her [the victim] or against her and you had ejaculated and you went and got a wash rag and you wiped her off?

[APPELLANT]: I am not sure if I ejaculated or not, I am not sure.

INVESTIGATOR CHAPMAN: Did you go get a wash rag and wipe her off?

[APPELLANT]: Yeah.

....

INVESTIGATOR CHAPMAN: And where did you wipe her with the wash rag, wet wash rag?

[APPELLANT]: Just -

INVESTIGATOR CHAPMAN: Did you wipe her private area with the wet wash rag?

[APPELLANT]: Yeah. It was on the inside of her leg and stuff.

INVESTIGATOR CHAPMAN: Okay. What do you think it was that was there?

[APPELLANT]: I just thought it was sweat, you know.

. . . .

INVESTIGATOR CHAPMAN: Were you erect at the time you woke up?

[APPELLANT]: Yeah.

INVESTIGATOR CHAPMAN: And you were there? Close to -

[APPELLANT]: More behind.

INVESTIGATOR CHAPMAN: Yeah. But protruding toward at least -

[APPELLANT]: Against her.

INVESTIGATOR CHAPMAN: Against or inside?

[APPELLANT]: Against.

INVESTIGATOR CHAPMAN: You weren't inside?

[APPELLANT]: No.

INVESTIGATOR CHAPMAN: But do you know if you had been?

[APPELLANT]: No.

INVESTIGATOR CHAPMAN: I mean, is that what you were wiping with the wash rag that you thought was sweat?

[APPELLANT]: I didn't think I had ever been inside of her. I would hate to think that.

Appellant went on to admit that he slept in the same bed with the victim nearly all her life, and that he usually woke up with an erection. Appellant stated that he normally slept without clothing unless there were children in the bed, but admitted that on the occasion with the washcloth, his boxer shorts were off and his penis was erect and pressed against the victim. When Investigator Chapman questioned Appellant again about the "sweat" he wiped from the victim's vaginal area, Appellant admitted that it was "sticky." Appellant claimed that if he penetrated the victim, he "didn't know [he] was there." At the conclusion of the interview, Investigator Chapman asked Appellant if the victim was lying. Appellant replied, "From her point of view, probably not."

Two days later, Investigator Chapman again interviewed Appellant at the Sheriff's Office. On that occasion, Appellant denied ever forcing the victim to perform oral sex. The following exchange occurred during the second interview.

[APPELLANT]: I just want it all to end.

INVESTIGATOR CHAPMAN: Well, it is going to end. The question is how.

[APPELLANT]: I know that, you know.

INVESTIGATOR CHAPMAN: You can't help [the victim] unless you help [the victim].

[APPELLANT]: I know. And that is the thing that bothers me the most is that, you know, I pretended it was all a dream and never said nothing [sic] about it. And she never said anything about it. So I thought, well, she is young, you know, and, you know, she will just forget about it. And apparently not.

Lisa Dupree is a social worker at Our Kids Center in Nashville, a center that provides medical and psychological exams to children that may have been abused or neglected. Ms. Dupree testified that she was responsible for primarily collecting history from parents and caretakers who are bringing children in and gathering information from children prior to their exam for medical diagnosis and treatment. On August 6, 2003, Ms. Dupree met with the victim and her mother. Ms. Dupree noted that when questioned about the touching of her genital area, the victim began to cry. The victim reported penile-genital contact and penetration by Appellant. C.E. informed Ms. Dupree that the touching was on the inside and outside of her private area and that she touched her mouth to Appellant's "private." According to Ms. Dupree, when C.E. was asked if anything came out of Appellant's "private," the victim "made a facial expression consistent with the experience of a bad taste" and described "green snot-looking stuff." C.E. told Ms. Dupree that the substance went on both her private and in her mouth. After meeting with C.E. and her mother, Ms. Dupree recommended that she receive counseling specific for issues related to sexual abuse.

Sue Ross, a pediatric nurse practitioner at Our Kids Center, testified that she performed a complete physical on C.E. According to Ms. Ross, the results of C.E.'s genital and anal exam were normal. In Ms. Ross's expert opinion, these results "neither confirmed nor ruled out the possibility of any kind of sexual contact."

Appellant also presented proof at trial. Appellant's brother, Charles Curnutt, denied ever visiting Appellant's home at a time when Appellant was alone with the victim.

The victim's mother, testified that she suffered from bipolar disorder. She confirmed that the victim spent the night at Appellant's house after field day, but could not remember the exact date. C. E.'s mother stated that the victim, accompanied by her friend Joyce Baker, told her about Appellant's actions.

Bonnie Curnutt, Appellant's wife, testified that on the night of the science project, Appellant was never alone with the victim. According to Mrs. Curnutt, the victim only spent the night at their house on one occasion following a birthday party. That night, the victim and the other children slept on the couch with her friend Rita Harmon.

Rita Harmon, Mrs. Curnutt's friend, recalled the birthday party in 2003 that was held at Appellant's house. Ms. Harmon stated that she spent the night at the house and slept on the sectional sofa. The victim and her siblings slept on the sofa bed portion of the sectional.

C.E., the victim, was also called by the defense. She testified that after field day, her mother picked her up at school and took her to Appellant's house. When they got to Appellant's house, she and her sisters watched television, played and then had a mud fight. She reaffirmed that the next morning, Appellant "did something bad" to her. The victim also restated that when she and Appellant were working on the science project, Appellant put his penis inside her, but she could not say how far. The victim described the act as painful.

At the conclusion of the proof, the jury convicted Appellant of two counts of child rape. After a sentencing hearing, the trial court sentenced Appellant to fifteen years for each child rape conviction, and ordered the sentences to run consecutively, for a total effective sentence of thirty years.

After the denial of a motion for new trial, Appellant initiated this appeal. Appellant seeks determination of the following issues: (1) whether the trial court failed to require the State to elect offenses; (2) whether Appellant's statement was improperly admitted into evidence; (3) whether the jury pool was unfairly prejudiced; (4) whether the jury was properly instructed on lesser included offenses; and (5) whether the evidence was sufficient to sustain the convictions.

Analysis

Election of Offenses

Appellant argues on appeal that his convictions should be reversed and a new trial granted due to the failure of the prosecution to elect offenses. Specifically, he asserts that the evidence showed more than one act of sexual penetration on each occasion during which Appellant raped the victim and that the trial court's failure to require the State to elect which offenses they were basing their proof on "betrays a fundamental misunderstanding of the doctrine of election." The State acknowledges that the trial court failed to require the State to make a formal election, but argues that the prosecutor effectively elected offenses during closing arguments to the jury.

As Appellant suggests, the record in this case is devoid of instructions from the trial court regarding election.³ The requirement of election and a jury unanimity instruction exists even though Appellant has not requested them. *See Burlison v. State*, 501 S.W.2d 801, 804 (Tenn. 1973). Rather, it is incumbent upon the trial court even absent a request from the defendant to ensure that the State properly makes an election in order to avoid a " 'patchwork verdict' based on different offenses in evidence." *State v. Shelton*, 851 S.W.2d 134, 137 (Tenn. 1993). Moreover, failure to follow the procedures is considered an error of constitutional magnitude and will result in reversal of the conviction, absent the error being harmless beyond a reasonable doubt. *See State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000); *see also Shelton*, 851 S.W.2d at 138.

The election requirement was first adopted in this state in *Jamison v. State*, 117 Tenn. 58, 94 S.W. 675 (Tenn. 1906). In *Jamison*, the Tennessee Supreme Court held that proof of all sexual acts allegedly committed by the defendant against the victim could be admitted into evidence, but to avoid the prosecution of uncharged sex crimes, the State was required to elect the specific act upon which it was relying to obtain a guilty verdict. *Id.* at 676. Since that time, the election

³The trial court mentioned election at the close of the proof, stating, "At the close of the State's proof, it was clear to the Court that election was not an issue." The trial court went on to note that the jury form would reflect that Count One referred to the incident that occurred the Saturday after field day and Count Two referred to the Sunday/science project incident. Both the State and counsel for Appellant agreed.

requirement has been applied almost exclusively in the sex crimes context, and specifically, when the defendant is alleged to have committed a series of sexual acts over a lengthy period of time against young children who are often unable to identify the exact date on which any one act was perpetrated. *See, e.g., State v. Brown*, 992 S.W.2d 389 (Tenn. 1999) (finding that the trial court erred in failing to require an election when the defendant was charged with rape of a child in a one count indictment that covered a six-month time frame, but the proof showed that at least ten instances of digital penetration occurred during the six months alleged, five occurring on one day and five others on different days); *State v. Walton*, 958 S.W.2d 724 (Tenn. 1997) (finding an election should have been required where sexual offenses were charged in a multi-count, open-ended indictment and where the child victim testified she was raped by the defendant or that he performed cunnilingus on her on a daily basis for over a year); *Burlison*, 501 S.W.2d at 804 (finding an election should have been required where the defendant was charged with having “carnal knowledge” of the victim on “diverse days between the summer of 1964 and August, 1969,” but the proof did not show any particular date).

In 1994 however, *Jamison* was overruled to the extent it had established an exception to sex crimes that permitted proof of all sexual acts allegedly committed by the defendant against the victim, whether charged or uncharged. *See State v. Rickman*, 876 S.W.2d 824, 829 (Tenn. 1994) (overruling *Jamison*). In *Rickman*, the court recognized that indictments often charge general time frames that encompass several months and, in those circumstances, the State may introduce evidence of sex crimes allegedly committed against the victim during the time frame charged in the indictment, but, at the close of the proof, the State must elect the facts upon which it is relying for conviction. *Id.* In fact, “it [is] the duty of the trial judge to require the State, at the close of its proof-in-chief, to elect the particular offense of carnal knowledge upon which it would rely for conviction, and to properly instruct the jury so that the verdict of every juror would be united on the one offense.” *Burlison*, 501 S.W.2d at 804.

Our supreme court has consistently held that the prosecution must elect the facts upon which it is relying to establish the charged offense if evidence is introduced at trial indicating that the defendant has committed multiple offenses against the victim. *See State v. Kendrick*, 38 S.W.3d 566, 568 (Tenn. 2001); *Brown*, 992 S.W.2d at 391; *Walton*, 958 S.W.2d at 727; *Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996); *Shelton*, 851 S.W.2d at 137. The requirement of election serves several purposes: (1) it enables the defendant to prepare for the specific charge; (2) it protects a defendant against double jeopardy; (3) it ensures the jurors’ deliberation over and their return of a verdict based upon the same offense; (4) it enables the trial judge to review the weight of the evidence in its role as the thirteenth juror; and (5) it enables an appellate court to review the legal sufficiency of the evidence. *Brown*, 992 S.W.2d at 391.

In the case herein, Appellant correctly points out that the trial court did not require the State to make an election. However, during closing arguments to the jury, the State, of its own volition, specifically elected the factual basis that it was relying on to convict Appellant of each charge in the indictment by detailing the events that the State wanted the jury to consider on each count. The prosecutor clearly identified for the jury that it was the act of penetration of the victim’s vagina with

Appellant's penis on both the day after field day and the day of the science project on which the State was seeking a conviction. In its rebuttal closing argument, the State reviewed the evidence presented at trial for each element of the offense of rape of a child based on the act of penetration. This Court has previously determined that a trial court's failure to properly instruct the jury about the State's election may be harmless "where the prosecutor provides during closing argument an effective substitute for the missing instruction." *State v. William Darryn Busby*, No. M2004-00925-CCA-R3-CD, 2005 WL 711904, at *6 (Tenn. Crim. App., at Nashville, Mar. 29, 2005) (citing *State v. James Arthur Kimbrell*, No. M2000-02925-CCA-R3-CD, 2003 WL 1877094, at *23 (Tenn. Crim. App., at Nashville, Apr. 15, 2003)); *State v. Michael J. McCann*, No. M2000-2990-CCA-R3-CD, 2001 WL 1246383, at *5 (Tenn. Crim. App., at Nashville, Oct. 17, 2001), *perm. app. denied*, (Tenn. Apr. 1, 2002); *State v. William Dearry*, No. 03C01-9612-CC-00462, 1998 WL 47946, at *13 (Tenn. Crim. App., at Knoxville, Feb. 6, 1998), *perm. app. denied*, (Tenn. Jan. 19, 1999)). Based on our review of the entire record in this matter, we conclude that any error was harmless beyond a reasonable doubt and that the jury convicted Appellant of rape of a child based upon the conduct elected by the State. Appellant is not entitled to relief on this issue.

Introduction of Appellant's Statement

Next, Appellant contends that the trial court improperly admitted his statement into evidence. Specifically, Appellant argues that the statement was involuntary and coerced. The State disagrees, arguing that Appellant failed to raise the issue in the trial court prior to trial and has now waived the issue on appeal.

Prior to trial, counsel for Appellant filed a *motion in limine* arguing that portions of Appellant's statement to Investigator Chapman were inadmissible as irrelevant under Tennessee Rules of Evidence 401, 403 and 404. Specifically, Appellant argued that the portion of the statement about his sharing the bed with the victim and the washcloth incident occurred outside the time frame established by the victim in the indictment and were therefore irrelevant. The hearing was continued and resumed at trial when the State sought to introduce Appellant's statement in its entirety. During the hearing, the trial court and counsel for both the State and Appellant went through the statement line by line and redacted references to incidents occurring "several years ago" and those involving other victims. The trial court concluded that the victim was "very specific about the two counts" and determined that the washcloth incident was a relevant part of Appellant's statement and was admissible. At no time prior to or during trial did Appellant assert that his statement was involuntary. In his motion for new trial and on appeal, however, Appellant now asserts that his statement was involuntary and coerced.

"[A] party is bound by the grounds asserted when making an objection. The party cannot assert a new or different theory to support the objection in the motion for a new trial or in the appellate court." *State v. Adkisson*, 899 S.W.2d 626, 634-635 (Tenn. Crim. App. 1994); *see State v. Aucoin*, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988) (cannot object on one ground and assert new basis on appeal). When that happens, as in this case, the party waives the issue. *See Adkisson*,

899 S.W.2d at 635; *State v. Matthews*, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990); *Aucoin*, 756 S.W.2d at 715; *State v. Dobbins*, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988); *State v. Brock*, 678 S.W.2d 486, 490 (Tenn. Crim. App. 1984). Moreover, Tenn. R. Crim. P. 12(b)(2)(c), (e) requires that any motion seeking suppression of evidence, such as for an involuntary statement, be made prior to trial or the issue is deemed waived. No such motion to suppress was filed in this case. Consequently, we determine that Appellant has waived this issue on appeal.

Jury Pool Prejudice

Next, Appellant argues that his convictions should be reversed and a new trial granted due to the trial court's failure to give the jury a curative instruction following a juror's statement that Appellant should be shot. Specifically, Appellant argues that even though the trial court dismissed this juror, the statement "can be assumed to prejudice all those who heard it." The State contends that Appellant waived the issue for failure to cite authority for his argument and that the trial court did not err in failing to give a *sua sponte* curative instruction to the jury.

During *voir dire*, when asked if they could "listen to [the] evidence and base [their] decision solely on that evidence" one of the potential jurors responded, "I think [Appellant] should be shot and I could use my gun." On further questioning, this potential juror stated that he could not fairly consider the evidence and would have Appellant "convicted." After this episode, the trial court excused this person from the jury pool.

On appeal, Appellant fails to cite authority for his argument that the jury pool was prejudiced by the potential Jurors statement. Appellant's brief is inadequate because it fails to cite to authority supporting his argument. *See* Tenn. Ct. Crim. App. R. 10(b) (stating issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this Court). Further, Appellant failed to object to the potential juror's statement and failed to request that the trial court give a curative instruction to the jury pool. When a defendant fails to request a curative instruction, he waives the issue on appeal. *See* Tenn. R. App. P. 36(a); *State v. Jones*, 733 S.W.2d 517, 522 (Tenn. Crim. App. 1987). This issue is waived.

Lesser-Included Offense Instructions

Next, Appellant asserts that the trial court erred in failing to instruct the jury on the lesser-included offenses of attempted rape of a child and child abuse. Specifically, Appellant contends that despite trial counsel's failure to request the instructions, the proof supported the inclusion of attempted rape of a child as a lesser-included offense, and the legislature has designated child abuse as a lesser-included offense of any kind of sexual offense if the victim is a child. Citing *State v. Page*, 184 S.W.3d 223, 229 (Tenn. 2006), the State argues that Appellant's failure to request the lesser-included instructions in writing results in a waiver of this issue on appeal.

T.C.A. § 40-18-110 requires the defendant to request lesser-included offense instructions in writing at trial in order to subsequently appeal a trial court's failure to instruct on such offenses. T.C.A. § 40-18-110 states, in pertinent part:

(b) In the absence of a written request from a party specifically identifying the particular lesser included offense or offenses on which a jury instruction is sought, the trial judge may charge the jury on any lesser included offense or offenses, but no party shall be entitled to any such charge.

(c) Notwithstanding any other provision of law to the contrary, when the defendant fails to request the instruction of a lesser included offense as required by this section, such instruction is waived. Absent a written request, the failure of a trial judge to instruct the jury on any lesser included offense may not be presented as a ground for relief either in a motion for new trial or on appeal.

In *Page*, the Tennessee Supreme Court determined that T.C.A. § 40-18-110 was constitutional, concluding that "if a defendant fails to request an instruction on a lesser-included offense in writing at trial, the issue will be waived for purposes of plenary appellate review and cannot be cited as error in a motion for new trial or on appeal." *Page*, 184 S.W.3d at 229. However, the court went on to note that appellate courts were not precluded from reviewing the issue *sua sponte* under the plain error doctrine. *Id.* at 230.

The record on appeal shows that trial counsel failed to request lesser included offense jury instructions in writing. In fact, the following discussion regarding lesser-included offenses appears in the transcript between counsel for Appellant, the trial court and counsel for the State:

THE COURT: All right. Do I have a filing on request for lesser included from the state or from the defense?

[COUNSEL FOR APPELLANT]: No, Your Honor.

[COUNSEL FOR THE STATE]: Your Honor, we do . . . request lesser included offenses.

THE COURT: All right. What are you requesting, General?

[COUNSEL FOR THE STATE]: Your Honor, under the A.O.C. guidelines that we have and based on the proof in this case, the state would ask for aggravated sexual battery. We were discussing the question with regard to attempted rape of a child. I don't think there has been any proof that there was an attempt. The state wouldn't necessarily be requesting attempt. We would request aggravated sexual battery. I think in light of *Elkins*, we may have to consider whether or not a child abuse instruction would be applicable. She did not claim any injuries, I don't believe. And I don't believe any were noted in any medical reports. . . .

[COUNSEL FOR APPELLANT]: We would rather not have that instruction, the child abuse instruction, Judge.

THE COURT: You are agreeing to child abuse?

[COUNSEL FOR APPELLANT]: No.

THE COURT: That is not a proper instruction?

[COUNSEL FOR APPELLANT]: No. Not a proper instruction.

....

THE COURT: Are we in agreement, then, on those . . . [t]wo lessers: Aggravated sexual battery, intentional touching, a Class B misdemeanor, or not guilty, right?

[COUNSEL FOR APPELLANT]: Yes, Your Honor.

THE COURT: Are we in agreement?

[COUNSEL FOR THE STATE]: Yes, ma'am.

THE COURT: All right. Let me make sure that somebody has filed anything. Are you aware of the following, [counsel for Appellant]? Absent a written request, failure of a trial judge to instruct the jury on any lesser included . . . may not be presented as a ground for relief and enter a motion for new trial on appeal?

[COUNSEL FOR APPELLANT]: Yes, Your Honor.

THE COURT: All right. I will work on the charge

It is clear from the transcript that Appellant failed to request any lesser-included offense instructions in writing and actually opposed the inclusion of child abuse as an instruction. Thus, Appellant has waived this issue on appeal. *See Page*, 184 S.W.3d at 229.

We now address whether it was plain error for the trial court to fail to give a lesser-included offense instruction on child abuse and attempted rape of a child, even when Appellant did not properly preserve the issue for appeal. When determining whether plain error review is appropriate, the following five factors must be established:

- (a) the record must clearly establish what occurred in the trial court;
- (b) a clear and unequivocal rule of law must have been breached;
- (c) a substantial right of the accused must have been adversely affected;
- (d) the accused [must not have waived] the issue for tactical reasons; and
- (e) consideration of the error [must be] "necessary to do substantial justice."

State v. Terry, 118 S.W.3d 355, 360 (Tenn. 2003) (citing *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted)).

In the present case, at trial, Appellant failed to request a lesser-included offense instruction on attempted rape of a child and child abuse, even arguing to the trial court that child abuse was not a proper instruction under the circumstances. Appellant has failed to show that he did not waive this issue for tactical reasons. Therefore, the trial court's failure to instruct on attempted rape of a child and child abuse does not rise to the level of plain error. This issue is without merit.

Sufficiency of the Evidence

Lastly, Appellant challenges the sufficiency of the evidence. Specifically, he argues that the only proof offered at trial was the uncorroborated testimony of the victim and that her testimony was not sufficient to support the convictions for rape of a child. The State counters that the evidence was sufficient to support the convictions.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and “approved by the trial judge, accredits the testimony of the” State’s witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption “and replaces it with one of guilt.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own “inferences for those drawn by the trier of fact from circumstantial evidence.” *Matthews*, 805 S.W.2d at 779. Further, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

In order to convict Appellant of rape of a child, the State had to prove beyond a reasonable doubt that Appellant engaged in unlawful sexual penetration with C.E. and that C.E. was less than thirteen years of age at the time of the penetration. *See* T.C.A. § 39-13-522. Sexual penetration means “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of the victim’s, the defendant’s, or any other person’s body, but emission of semen is not required.” *Id.* 39-13-501(7).

Looking at the evidence in a light most favorable to the State, the victim testified that she stayed the night at Appellant’s house after field day and when she was doing a science project. On both of those occasions, Appellant vaginally raped her. The victim specifically stated that Appellant’s penis was inside her body as opposed to touching her vagina. Our supreme court has determined that the testimony of a child victim, alone, is sufficient to uphold a conviction for child rape. *State v. Elkins*, 102 S.W.3d 578, 582-82-83 (Tenn. 2003).

As stated previously, determining the credibility of witnesses and the weight to be given their testimony as well as resolving conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. *Odom*, 928 S.W.2d at 23. This Court, even if it wished to do so, may not substitute its evidentiary inferences for those drawn by the jury. *Matthews*, 805 S.W.2d at 779. Here, it appears from the verdict that the jury chose to believe the testimony of the victim. Under well-settled Tennessee law, the jury was within its province in doing so. Thus, we find that, when viewed in a light most favorable to the State, the evidence is legally sufficient to support Appellant's convictions for rape of a child.

Conclusion

For the foregoing reasons, we affirm the judgments of the trial court.

JERRY L. SMITH, JUDGE